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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 1633

VILLAGE OF CHICAGO RIDGE,
a Municipal Corporation, Petitioner

v.

JAMES L. GARDNER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner, Village of Chicago Ridge, a municipal corporation, petitions for a Writ of Certiorari to review a Decision of the Appellate Court of Illinois, and a subsequent denial by the Supreme Court of Illinois of an Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal from that Decision.

OPINIONS

The denial by the Supreme Court of Illinois of Petitioner's Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal is unreported; a copy of the Order of Denial is attached to this Petition as "Appendix

A". The Decision of the Appellate Court of Illinois, which reversed the trial court's verdict in favor of Petitioner is reported at 128 Ill. App. 2d 157, 262 N.E. 2d 829 (1970). A copy of said Decision is attached to this Petition as "Appendix B". A copy of Petitioner's Appeal as a Matter of Right or, in the alternative, Petition for Leave to Appeal is attached hereto as "Appendix C".

JURISDICTION

On August 19, 1970, the Appellate Court of Illinois, First District, Fourth Division reversed in part and affirmed in part a judgment of the Circuit Court of Cook County, Illinois. A rehearing was denied on October 5, 1970. The Supreme Court of Illinois denied an Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal, on January 26, 1971.

Jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the Illinois adverse witness statute (Ill. Rev. Stat., Ch. 110, §60) as interpreted by the Appellate Court of Illinois herein deprive Petitioner of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Does the denial of Petitioner's Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal deny Petitioner procedural due process guaranteed by the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Const. amend XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat., Ch. 110, §60.

Upon the trial of any case any party thereto or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements.

Illinois Supreme Court Rule 317 (Ill. Rev. Stat., Ch. 110A, §317)

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition in the form prescribed by rule 315, except that (a) the petition shall be entitled "Petition for Appeal as a Matter of Right"; (b) item (1) of the petition shall state that the appeal is taken as a matter of right and may pray in the alternative for leave to appeal; and (c) item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right and may also contain argument as to why in the alternative leave to appeal should be allowed as a matter of sound judicial discretion. In other respects the procedure is governed by rule 315. If the Court allows the petition, excerpts from record or an abstract and briefs shall be filed as provided in the case of appeal by leave under rule 315.

Illinois Supreme Court Rule 315(a) [Ill. Rev. Stat., Ch. 110A, §315(a)]

> A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Illinois Supreme Court Rule 302(a) [Ill. Rev. Stat., Ch. 110A, §302(a)]

> Appeals from the final judgments of circuit courts shall be taken directly to the Supreme Court (1) in cases involving revenue, (2) in cases involving a question arising under the constitution of the United States or of this state, (3) in cases of habeas corpus, (4) in proceedings to review orders of the Industrial Commission, and (5) in proceedings to review orders of the Illinois Commerce Commission.

STATEMENT OF THE CASE

Plaintiff, James L. Gardner, sued the Village of Chicago Ridge, the Village of Worth, police officers Stanley Wank and Steve Horvath of the Village of Chicago Ridge Police Department, police officers Richard Demblon and Bernard Bartuch of the Village of Worth Police Department, Frank Skubis, Gary LaValley, Richard Souliotis, and Larry Posthuma for personal injuries plaintiff allegedly sustained. At the trial which ensued, plaintiff called as adverse witnesses defendants Bartuch, Wank, and Horvath, pursuant

to Section 60 of the Illinois Civil Practice Act (Ill. Rev. Stat. Ch. 110, Sec. 60). Over objection of counsel for plaintiff, the trial court advised the jury at the time of testimony that the testimony of each of the three adverse witnesses was confined to the party as to whom the witness was called, and was not to be applied against the other defendants in the case. At the close of plaintiff's evidence, the trial court directed a verdict in favor of police officers Wank, Horvath, Demblon, and Bartuch, and their two respective municipalities.

Plaintiff appealed the directed verdicts; the Illinois Appellate Court affirmed the judgment as to defendant Demblon, but reversed and remanded for a new trial as to the other police officers and as to the Villages of Chicago Ridge and Worth; a Petition for Rehearing was denied. In reversing the judgments, the Appellate Court of Illinois stated, *inter alia,* that the confinement of the adverse witness testimony to the party as to whom the witness was called was erroneous. Under the law of Illinois this ruling by the Appellate Court constitutes "law of the case" which binds the trial court in a new trial.

The Village of Chicago Ridge, as well as Steve Horvath, Stanley Wank, Bernard Bartuch and the Village of Worth, filed an Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal to the Supreme Court of Illinois. Ill. Rev. Stat., Ch. 110 A, §§ 317, 315(a). As a basis for the Appeal it was asserted that the application of testimony received under Section 60 of the Illinois Civil Practice Act against parties as to whom the witnesses was not called denies those parties the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Without making any distinction between the Appeal as a Matter of Right and the alternative Petition for Leave to Appeal filed in compliance with Rule 317, the Supreme Court of Illinois entered an order

denying the Appeal and assessing costs against appellants. The Appeal as a Matter of Right was thus denied without any hearing, a situation arising from the ambiguous provisions of Rule 317.

REASONS FOR GRANTING THE WRIT

(1)

The Illinois adverse witness statute (Ill. Rev. Stat., Ch. 110, § 60) as interpreted by the Illinois Appellate Court herein deprives Petitioner of equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Appellate Court of Illinois concludes with a holding that it is error to limit the testimony of a witness called under Section 60 of the Illinois Civil Practice Act to the party as to whom the witness is called. A witness called under that Section may be ". . . examined as if under cross-examination at the instance of any adverse party". Moveover, the party calling the witness under that Section " . . . may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements".

If a party is sued alone, Section 60 can be invoked only if a witness sought to be called is a witness who meets the requirements of the statute. The witness can otherwise be called, of course, but only subject to those rules applicable to witnesses who do not qualify as "adverse". The Appellate Court opinion herein deprives a litigant of protection built into Section 60. According to that opinion, even though a witness is not adverse as between the plaintiff and one defendant, the plaintiff may call him to testify against that defendant under Section 60 if the witness is adverse as between the plaintiff and any *other* defendant. This interpretation of Section 60 by the Appellate Court of Illinois is highly discriminatory in favor of sole de-

fendants, as opposed to multiple defendants. The Fourteenth Amendment to the Constitution of the United States forbids the unequal treatment inherent within this interpretation of Section 60.

(2)

The denial of Petitioners Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal denies Petitioner procedural due process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Illinois Supreme Court Rule 317 grants an appeal as a matter of right to the Supreme Court of Illinois when a question under the Constitution of the United States or under the Constitution of the State of Illinois arises for the first time in and as a result of the action of the Appellate Court of Illinois. Ill. Rev. Stat., Ch. 110A, § 317. Petitioner, Village of Chicago Ridge, in its Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal to the Supreme Court of Illinois, asserted a question under the Constitution of the United States which arose for the first time in and as a result of the action of the Appellate Court of Illinois. Petitioner asserted that the Appellate Court's holding that it is error to limit the testimony of a witness called under Section 60 of the Illinois Civil Practice Act (Ill. Rev. Stat., Ch. 110, § 60) to the party as to whom the witness is called, constitutes a denial of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Illinois denied the Appeal without even referring to the issue presented.

There are three possible reasons for the denial of the Appeal as a Matter of Right, each of which results in denial of due process: (1) the Supreme Court of Illinois held that *no* Constitutional question arose for the first time as a result of the action of the Appellate Court of Illinois; (2) the

Supreme Court of Illinois held that a Constitutional que tion, but not a "substantial" or "fairly debatable" Constitu tional question, arose for the first time as a result of th action of the Appellate Court of Illinois;[1] (3) the Suprem Court of Illinois, in denying the Appeal as a Matter o Right, decided that a Constitutional question arose, co sidered the substance of that Constitutional question, an decided the question adversely to Petitioner.

If the Supreme Court of Illinois held that no Constitu tional question arose and denied the Appeal as a Matte of Right, its holding is clearly unwarranted; a Constitu tional issue *did arise,* as discussed above. Petitioner's de nial of Illinois Supreme Court review of that Constitutiona question, pursuant to Rule 317, constitutes a denial of pro cedural due process guaranteed by the Fourteenth Amend ment to the Constitution of the United States.

If the Supreme Court of Illinois held that a Constitu tional question, but not a "substantial" or "fairly debat able" question arose, and therefore denied the Appeal as Matter of Right, Petitioner is still denied procedural du process. In the context of the "direct appeal" from th circuit court to the Supreme Court of Illinois, the "sub

[1] Although the Supreme Court of Illinois has not yet interprete "question" in the context of Illinois Supreme Court Rule 317, i has interpreted "question" in the context of Illinois Supreme Cour Rule 302(a) which provides that, "Appeals from the final judg ments of circuit courts shall be taken directly to the Supreme Cour . . . in cases involving a question arising under the constitution o the United States or of this State . . ." Ill. Rev. Stat., Ch. 110A § 302(a). The Supreme Court of Illinois has interpreted "question in this context as being a "substantial q estion" or a "fairly debat able question". *First National Bank & Trust Co.* vs. *City of Evans ton,* 30 Ill. 2d 479, 482-483, 197 N.E. 2d 705 (1964); *People* v *Arbuckle,* 31 Ill. 2d 163, 201 N.E. 2d 102 (1964); *Herman* vs *Prudence Mutual Casualty Co.,* 38 Ill. 2d 98, 230 N.E. 2d 23 (1967).

stantial" or "fairly debatable" standard *can* be used without offending due process. In that context, when the Supreme Court of Illinois decides that a Constitutional question, but not a "substantial" or "fairly debatable" question, arose at the circuit court level, it remands the case to the Appellate Court of Illinois for consideration. *First National Bank & Trust Co., supra, Note 1.* The appellant is afforded appellate review of his Constitutional question thereby. However, in the context of a "non-substantial, non-debatable question" arising at the appellate level, there need be no remand, under the present holding; yet, *the Constitutional question admittedly exists.* Due process is offended thereby.

If the Supreme Court of Illinois, in denying the Appeal as a Matter of Right, decided that a Constitutional question arose, considered the substance of that Constitutional question, and decided the question adversely to Petitioner, the jurisdictional nature of Rule 317 was blatantly ignored by that Court. Moreover, Petitioner's Constitutional question was heard in chambers, with Petitioner being conspicuous by absence. Such procedure harshly offends due process.

Illinois Supreme Court Rule 317 states that an appeal lies as a matter of right when, as in this case, a Constitutional question arises by reason of the decision of the Illinois Appellate Court. Petitioner prosecuted an appeal pursuant to that Rule, which appeal was denied without reason and without hearing. Certainly, the denial deprived Petitioner of due process of law. Rule 317 procedure is ambiguous at best. When the Supreme Court of Illinois uses that procedure to deny a hearing on a Constitutional question, that Rule cannot stand.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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